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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: [Redacted]

Office: TEXAS SERVICE CENTER

Date: JAN 10 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office



DISCUSSION: The employment-based visa petition was denied by the Director, Texas Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Texas organization incorporated in 1992. It is a cardiac rehabilitation treatment facility. It seeks to employ the beneficiary as its new president. Accordingly, the petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the Service did not properly consider all the evidence submitted.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an

affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

The issue in this proceeding is whether the beneficiary will be performing managerial or executive duties for the United States enterprise.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a

managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially provided two separate position descriptions for the beneficiary's proffered position of president. In the petitioner's formal job offer and position description, the petitioner provided a lengthy position description. As the position description was repeated verbatim on appeal, it is not repeated in full here. The petitioner allocated the beneficiary's time into five different areas. The five areas are:

Business Planning - fourteen hours
Contract Acquisition & Administration and Financial Management - eleven and one-half hours
Marketing Development - ten hours
Corporate and Community Relations - seven hours
Parent-Affiliation Liaison - four hours
Performance Review and Evaluation - three and one-half hours

The petitioner's current president and owner signed the job offer. The petitioner's current president and owner also signed a letter supporting the beneficiary's classification as a multinational executive or manager. The letter stated that the beneficiary would be responsible for "providing direct oversight of [the petitioner] as it expands its current business and operations into Taiwan and the Pacific Rim," and would "develop and launch key marketing strategies in target cities within Midwest regions . . . as well as in Taiwan and the Pacific Rim." The letter also indicated that the beneficiary would "oversee all of [the petitioner's] professional staff and contracted service providers," as well as "devot[ing] her full time to the expansion

operations of [the petitioner]."

It is the contradictory nature of the petitioner's statements regarding the beneficiary's proposed duties that apparently prompted the director to request additional information regarding the beneficiary's proposed duties and to ask specifically if there were other employees who would be performing the petitioner's marketing duties to expand the petitioner's business.

The director's request for evidence on this issued resulted in the following response:

There are no other employees within the U.S. company who currently perform marketing duties. The reason for this is that [the petitioner] has, for several years, acquired its client base through physician referrals. For this reason and at this stage of the company's operation, there has not been a need for [the petitioner] to engage in aggressive marketing.

. . . [the petitioner] will need to hire someone who is skilled in performing marketing functions and one who can readily assume these critical responsibilities. The Beneficiary is this 'someone,' since she possesses the unique combination of experience, language requirements, and specialized knowledge to effectively market and expand [the petitioner's] client base both inside and outside of the United States.

The petitioner also added that the beneficiary would plan, coordinate, and control the petitioner's operations, establish goals and policies, negotiate supplier, equipment, inventory, and service contracts, oversee the petitioner's financial and operational performance, oversee employees, hire additional employees, liaise between the petitioner and the beneficiary's overseas employer, and meet with others to implement and accomplish the expansion objectives.

The director concluded from this information that the beneficiary's primary responsibility would be performing marketing, advertising, and financial duties for the petitioner. The director found that the beneficiary's supervision of subordinate personnel and execution of many of the company's mundane tasks were not duties primarily associated with executive or managerial tasks.

On appeal, counsel repeats the petitioner's description of the beneficiary's duties and contends that the beneficiary will be responsible for directing all operational and management functions, while overseeing the work of managerial or professional employees. Counsel contends that the Service failed to give proper weight to the evidence in the record and acted arbitrarily in reaching its decision.

Counsel's contentions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). The petitioner has not effectively clarified the apparent contradiction in the record that the beneficiary will devote her full time to the expansion operations of the petitioner but will also direct all operational and management functions and oversee the work of managerial or professional employees. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). The petitioner's statements are especially confusing when examining the petitioner's "pre-acquisition" organizational chart and the proposed organizational chart. The charts reveal that the current owner and president will become the petitioner's vice-president. The petitioner has not fully explained the transfer of the current owner's duties to the beneficiary. The record is deficient in explaining how the addition of the beneficiary as president who devotes her full-time to marketing duties will affect the duties of the current owner who has been directing the operation of the petitioner all along. Without further information, the director correctly concluded that the record supports only a conclusion that the beneficiary will be primarily involved in providing marketing and financial services to the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). The Service does not have sufficient information to conclude that the beneficiary will be the individual primarily responsible for supervising the petitioner's staff.

The record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The description of the beneficiary's proposed job duties contains contradictions that have not been clarified. The description of the duties to be performed by the beneficiary does not effectively demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established a qualifying relationship with a foreign entity. In order to qualify for this visa classification, the petitioner

must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company.

In response to the director's request for evidence on this issue the petitioner provided a copy of a merger agreement dated November 1, 1999. The merger agreement provided that the foreign entity agreed to purchase 100 percent of the petitioner for a down payment of \$80,000, of which \$65,000 would be held in a mutually agreed upon account in the name of the petitioner and \$15,000 that would be paid within twelve months. The foreign entity also agreed to provide additional capital in the form of a note due and payable within three and one-half years from the date of the merger agreement. The petitioner also provided a copy of a wire transfer from the beneficiary to an escrow account in the sum for the sum of \$65,000. The petitioner further provided a copy of a bank statement for an escrow agent showing a balance of \$66,527.85 in July of 2000. Counsel asserted that the monies would remain in the escrow account until such time as the beneficiary's immigrant petition had been approved. Counsel also asserted that these documents along with the stock certificates and stock ledger previously submitted established that a qualifying relationship between the petitioner and the beneficiary's overseas employer.

Counsel's assertion that the petitioner had submitted sufficient documentary evidence to establish a qualifying relationship is not persuasive. First, the wire transfer appears to be from the beneficiary not the foreign entity. A transfer of money from an individual without further explanation cannot establish that the foreign entity actually purchased an interest in the petitioner. Second, funds held in an escrow account awaiting a future event do not evidence that a purchase of the petitioner is complete. At the time of filing the petition, it appears that the petitioner was still owned by an individual unrelated to the beneficiary's foreign employer. Moreover, the record does not contain documentation that any monies, held in escrow or not, were paid by the foreign entity.

Also beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered wage.

8 C.F.R 204.5(g) (2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner has provided confusing information regarding the proffered wage. The Form I-140 indicates that the beneficiary will be paid \$52,000 per year. However, the merger agreement provided by the petitioner in response to the director's request for evidence indicates that the beneficiary's salary will be determined once the beneficiary assumes the position of president. The petitioner provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1998 that reflected net income of \$38,115, no compensation paid to officers, and \$114,644 paid in salaries. If the proffered wage is the \$52,000 stated on the Form I-140, the petitioner has not established its ability to pay the proffered wage.

For these additional reasons, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.